Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Empowering Consumers to Avoid Bill Shock	)	CG Docket No. 10-207
	)	
	)	
Consumer Information and Disclosure	)	CG Docket No. 09-158
	)	

COMMENTS OF VERIZON WIRELESS

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SUMMARY

Verizon Wireless is a strong proponent of informed customer choice and of providing customers with the information and tools they need to make those choices. In order to win and keep customers, the wireless industry, including Verizon Wireless, has every incentive to give customers information about their use of wireless services, and in fact, many providers already do so. The appropriate model for meeting consumers' needs in today's highly competitive wireless market is to rely upon providers' own incentives to satisfy consumers, rather than prescriptive regulations that would limit the flexibility of providers to respond to consumers' evolving needs.

The wireless industry is already supplying consumers with information to monitor and control their usage. Verizon Wireless, in particular, provides numerous tools to consumers to allow them to manage usage, including the following:

- Verizon Wireless proactively reaches out to customers who are trending to exceed their monthly domestic voice, messaging, or data allowances by sending them a free text alert to their devices. In addition, it sends messages to data card customers alerting them when they reach particular usage levels.
- The company provides customers access to their voice, messaging, and data usage information online through usage meters that depict usage during each billing cycle.
- Consumers can also access usage by keying in #MIN or #DATA on their devices.
- Customer care representatives can provide customers with voice, messaging, and data usage information and review alternative service plans that may better match customers' individual usage needs.
- Customers also may control their voice and messaging usage for any or all lines on their account through Verizon Wireless' Usage Controls.
- With respect to international usage, Verizon Wireless notifies customers when their handsets register with a cell site in a foreign country and when they have met certain service thresholds. Customers also may obtain detailed information regarding the costs associated with international services on Verizon Wireless' website.

Consumers can use all of this information to manage their accounts, thereby ensuring they do not

inadvertently exceed their service plans' voice, messaging, and data allowances or incur unintentional wireless service fees. And Verizon Wireless is not alone in its provision of usage management tools and information to consumers. Indeed, intense competition has led wireless carriers to provide consumers with detailed information about usage allowances but to do so in ways that competitively differentiate their products. Many carriers also have developed tools that allow customers to monitor and control their usage in various ways.

These tools have been very effective at keeping consumers informed regarding their wireless usage, as evidenced by consumers' overall satisfaction with wireless services in general and Verizon Wireless in particular. The challenge is to ensure that consumers are aware of the many tools and services that are already available today. The Commission therefore should focus its efforts on consumer education. The Commission and the wireless industry share the goal of ensuring that consumers have the information and tools they need in order to manage their usage. This is therefore an issue on which the Commission and wireless providers can, and should, work together. By partnering with industry to develop a variety of informational tools for consumers, the Commission can help ensure consumers receive the information they need and want.

In contrast, a mandatory usage alerting requirement suffers from multiple legal infirmities, and risks impeding competition and innovation with regard to the provision of information to consumers. First, the requirement would violate the Administrative Procedure Act as arbitrary and capricious because the NPRM fails to set forth data or other evidence proving that a rule is justified. To the contrary, the NPRM's purported "evidence" of a widespread "bill shock" problem is based largely on flawed surveys. Available data in fact shows that customers have access to considerable information about usage and that a more

appropriate regulatory response would be consumer education efforts. Second, neither Title II nor Title III of the Communications Act provides the Commission with the statutory authority to mandate alerts. Third, the proposed rule compels particular speech and thus raises significant First Amendment concerns.

In the NPRM, the Commission seeks comment on whether it should adopt additional requirements beyond the proposed rule and whether it should mandate how carriers implement the usage alerts. These proposals are particularly problematic. An overly rigid and detailed regulatory scheme that micromanages exactly how and when providers contact consumers with usage information, and what they must say, would impose substantial unnecessary costs on carriers and consumers. For example, the Commission should not require carriers to cut off service to a customer who has not specifically opted in to continued service after she has reached her monthly allowance of minutes, messages, or data as such a requirement could result in severe consequences for the affected customer. The Commission also should allow carriers to determine the form, substance, and timing of usage alerts. And, the Commission should not mandate alerts related to domestic roaming nor require alerts to be provided in "real time," which could negatively impact carriers' networks, degrading call quality and the customer experience, as well as require substantial carrier investment.

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Verizon Wireless hereby responds to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned docket.[1]

In the NPRM, the Commission seeks comment on proposed rules that would require carriers to send usage alerts to customers. The industry and the Commission have a common goal in this proceeding—to ensure consumers have the information they need to control and monitor their wireless usage. As detailed herein, however, the wireless industry, including Verizon Wireless, already provides consumers with numerous tools to help them monitor and control their wireless usage. The proposed regulations are therefore unnecessary. Moreover, the factual basis on which the NPRM relies for the rules is insufficient. Instead, the Commission should work with industry on efforts to educate consumers about the usage tools that are already available.

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[1] *Empowering Consumers to Avoid Bill Shock*, Notice of Proposed Rulemaking, 25 FCC Rcd 14625 (2010) ("NPRM").

I. CONSUMERS ARE WELL SERVED BY EXISTING USAGE MANAGEMENT TOOLS.

The market for wireless voice and data services is highly competitive. In this environment, service providers like Verizon Wireless provide extensive information to consumers about the terms and conditions of the services they offer as well as tools to help consumers manage their wireless services, because it makes good business sense to do so. By informing consumers of the attributes of their services and by providing customers with tools that allow them to monitor and control their use of those services, all carriers—including Verizon Wireless—are better able to attract new customers and retain existing customers.

A. Verizon Wireless Provides Consumers with Numerous Ways to Obtain Information regarding Usage.

1. Domestic Usage Management Tools for Handset Customers

Verizon Wireless provides customers with detailed information regarding their domestic voice, messaging, and data usage in various locations and at various times.[2] Consumers, in turn, can use this information to actively manage their accounts, so that they do not inadvertently exceed their plans' voice, messaging, and data allowances. Verizon Wireless also proactively reaches out to customers who are trending to exceed their monthly voice, messaging, or data allowances to alert them to their usage trends and offer them alternative, more cost-efficient service plans.

Free Message Alerts Notify Consumers of Potential Overages. Verizon Wireless notifies customers who have either exceeded or are trending to exceed their monthly voice, messaging,

[2] This usage information provides an estimate of a customer's voice, messaging, and data usage as of a specified date and time. This estimate may not include voice, messaging, and/or data usage incurred while roaming on other wireless carriers' networks due to delays in transferring roaming usage, and may not take into account any promotional or bonus allowance customers may have.

and/or data allowances. Specifically, around the 20th day of each customer's billing cycle, Verizon Wireless reviews each customer's account to determine whether that customer has surpassed or is trending to surpass his voice, messaging, or data allowances for the month and, if so, sends the account owner the following free text message:[3]

> Free VZW msg. You are on track to incur overage charges for Minutes, Data, or Messages. Acct Owner: call 866-XXX-XXXX or dial #MIN & #DATA to check usage.

If an account owner does not respond to this text message, Verizon Wireless may place an outbound prerecorded or live call to the customer.[4]

Free Usage Information Is Available in Numerous Locations. In addition to these alerts, Verizon Wireless provides customers with easy access to their monthly voice, messaging, and data usage in a number of ways at no cost. First, Verizon Wireless provides customers with a single website—My Verizon—which is personalized and tailored to each individual customer. At My Verizon, customers may obtain detailed information regarding their Verizon Wireless service plans and all other related information. My Verizon enables each customer to see multiple "usage meters" that graphically depict the customer's voice, messaging, and data usage as well as that customer's remaining voice, messaging, and data allowance under their chosen service plan.[5] The customer's billing cycle end date is also listed with each customer's usage

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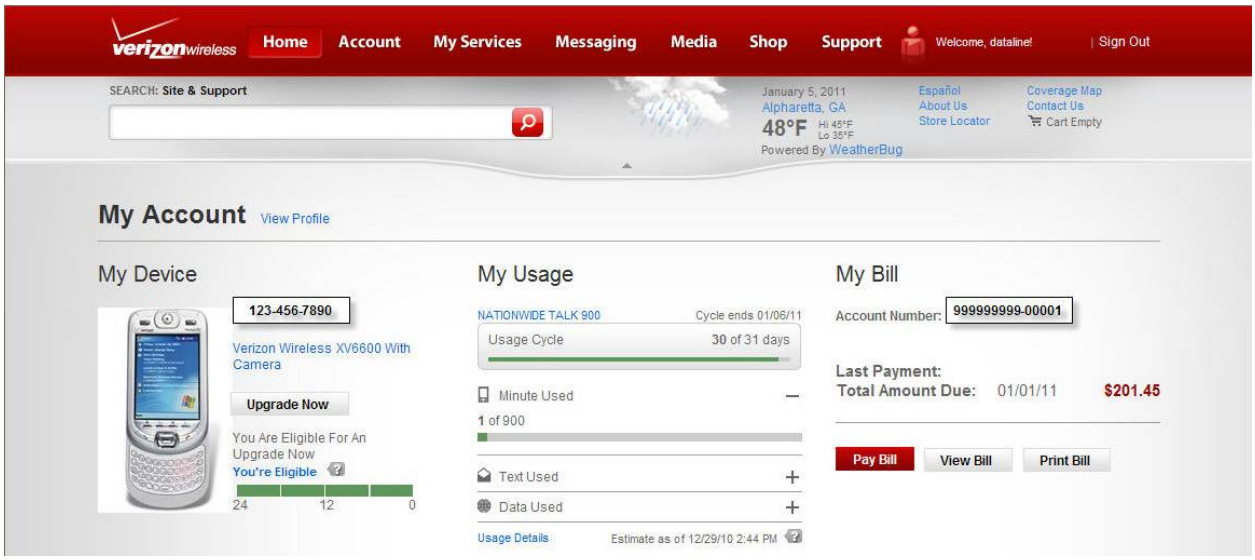
[3] A small percentage of eligible customers' accounts are randomly selected to be part of a control group each month and do not receive the message. This control group allows Verizon Wireless to monitor and analyze the effectiveness of its outreach program, resulting in improvements over time to these processes.

[4] Verizon Wireless attempts to call all customers who have not responded to the text message that have identified a "Can Be Reached At" phone number on their accounts. This prerecorded or live call reiterates the information included in the text message.

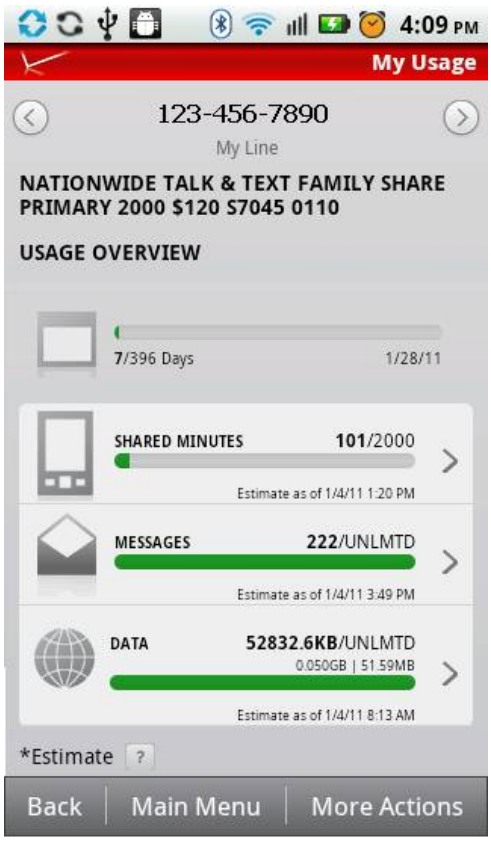
[5] The usage meter provides the effective date and time of the usage calculation, which, as noted above, *see supra* note 2, may not include voice, messaging, and/or data usage incurred while roaming on other wireless carriers' networks.

information. For example, printed below is a sample page showing the customer's voice usage meter:



In addition, customers may access their account and usage information in stores via My Verizon Express.

Customers also may access My Verizon on their handsets either via their web browsers or a dedicated application. Customers accessing My Verizon through their handset web browsers receive the same information they would if they were accessing it through their computers. The downloadable My Verizon application provides customers with easy access to their voice, messaging, and data usage information.



The My Verizon application is available for free on most Android and BlackBerry smartphones.

Second, customers may obtain information regarding their voice, messaging, and data usage by dialing #MIN or #DATA. By dialing #MIN, customers may obtain details regarding the number of Peak (non-Mobile-to-Mobile), Mobile-to-Mobile Peak, Mobile-to-Mobile non-Peak, Night, Weekend, and Shared minutes used during their current billing period.[6] Similarly, by dialing #DATA (or by connecting through #MIN), customers may obtain details regarding the number of text, picture, and video messages sent and received as well as the amount of data used during their current billing period. Customers also are reminded of the end date of their billing

[6] Verizon Wireless indicates the effective date and time for the quoted usage, which, as noted above, may not include voice, messaging, and/or data usage incurred on other wireless carriers' networks.

cycle by dialing these numbers. Customers may elect to have this information sent to them via a free text message.[7]

Finally, consumers may always contact Verizon Wireless' customer service representatives with questions about their monthly usage, service plan, or any other issue. Customer service representatives are available via a toll-free number. These representatives can inform customers about their voice, messaging, and data usage and allowances under their current plans as well as provide customers with advice on whether the customer should change to a plan or package with a larger voice, messaging, or data allowance. Customer service representatives also can provide consumers with instructions on how to obtain this information from My Verizon and their handsets.

Usage Controls Allow Customers To Control their Voice and Message Usage. For customers who are particularly concerned about not exceeding their monthly voice and messaging allowances, Verizon Wireless also offers Usage Controls. Customers who subscribe to Usage Controls (for $4.99/line/month) may set thresholds on the number of voice minutes and/or messages that may be used each month.[8] Once these thresholds are reached, chargeable voice and messaging is stopped.[9] Customers, however, may establish trusted numbers for which

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[7] These text messages may read as follows: (i) "#MIN Est thru 6/21 1:40 PM; Used=38; M2M PK=16; M2M OFFPK=21; NIGHT=76; WKND=43; Resets on 7/16"; (ii) "Est as of 6/21 1:40 PM; Other Txt Snt: 23 Dom. Usage will be reset 7/16"; or (iii) "Data Usage: Est as of 6/21/10 11:05 AM; 72477.1 KB."

[8] Usage Controls also allow the account owner to restrict voice and messaging services during designated times of day or days of week; block calls and messages from up to 20 numbers; block calls to 411 Directory Assistance; block incoming calls from numbers listed as private, restricted, and unavailable; and customize the settings for each controlled line on the account. *See* Exhibit 1 (screenshots of My Verizon Usage Control information).

[9] Usage Control subscribers may be required to update their default settings in My Verizon to establish automatic blocking.

calls and messages may always be sent and/or received, even if the predetermined threshold has been met. In addition, Verizon Wireless sends a free text message to the user when the user is within 15 minutes or messages of her threshold and to the account owner and the user when thresholds have been reached. The account owner may change the limit, add trusted numbers, block other numbers, and change account settings at anytime by going online at My Verizon.

Service Plans Help Customers Avoid Overage Charges. Consumers have access to a wide variety of voice, messaging, and data service plans that are designed to meet their individual needs. For example, Verizon Wireless offers customers plans with different buckets of minutes and/or buckets of text, picture, and video messages. Verizon Wireless also offers consumers plans that offer unlimited voice and/or messaging allowances. On the data side, Verizon Wireless offers plans that are designed to meet the needs of different types of customers, including unlimited, limited, and pay-per-use data plans for certain types of customers.[10] These options ensure there are a variety of service plans that will meet varying customer needs. The customer can choose a plan that most closely mirrors his wireless usage patterns.

If a customer determines—either on her own or after notification of an overage by Verizon Wireless—that an alternative service plan with a larger voice, messaging, or data allowance would better serve her needs, the customer may change to the new larger plan at any point during the billing cycle, and have that new plan become effective as of the beginning of the current billing cycle—thus enabling the customer to avoid overage charges. For example, if a

[10] Verizon Wireless also offers prepaid voice, messaging, and data services for those customers who do not need or want an unlimited plan but do not want to monitor their wireless usage. Prepaid customers may access their voice, messaging, and data usage through My Verizon (on their handset and online), by dialing *61 (Verizon Wireless' prepaid customer service interactive voice response system), #MIN or #DATA, or calling customer service. Verizon Wireless also notifies prepaid customers when their balance is low or their account is about to expire by sending them a free text message and making pre-call and post-call announcements.

customer is subscribed to Verizon Wireless' 250 text message bundle at the beginning of the billing cycle, exceeds this 250 message limit on the 10th of the billing cycle, and then upgrades to Verizon Wireless' 500 text message bundle on the 20th of the billing cycle, the 500 text message bundle will be effective as of the beginning of the billing cycle, unless otherwise requested by the customer. This "reset" policy ensures customers' needs are met throughout the term of their service agreement even if their usage increases during that time period.

Finally, customers may block data and messaging services entirely or partially. For example, customers may block ringback tone purchases, premium messaging, V CAST Music and Video, picture and video messaging, web purchases, and/or application downloads through My Verizon. And pay-per-use customers may completely block all data and/or messaging services.

2. Domestic Usage Management Tools for Data Card Customers

Mobile Broadband[11] customers—including 4G LTE customers—that access Verizon Wireless' network through data cards and modems or netbooks also receive detailed information regarding their data usage. Specifically, Verizon Wireless sends an email and/or a text message to Mobile Broadband customers who use VZAccess Manager when they reach 50%, 75%, 90%, and 100% of their monthly data allowance.[12]

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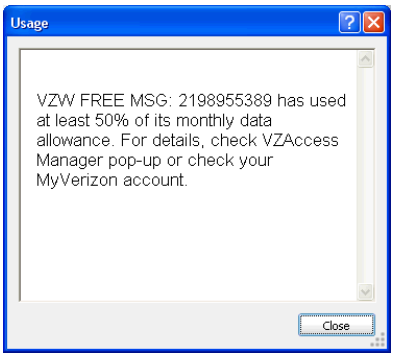
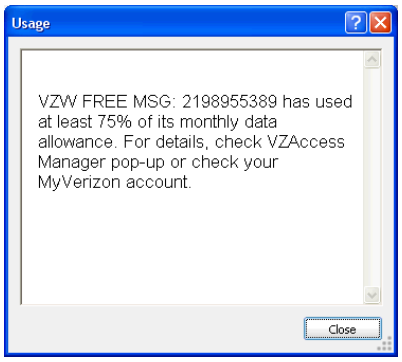
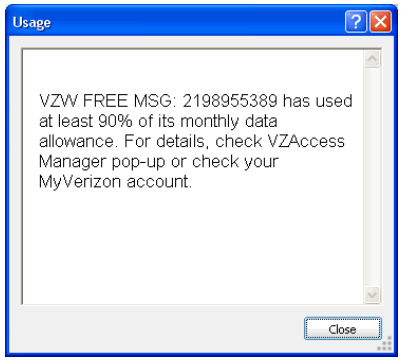
[11] Verizon Wireless' "Mobile Broadband" service allows customers to browse the Internet, download files, and access email over Verizon Wireless' network from their laptop computer, netbook, or other device using a data card, USB modem, built-in modem, or Verizon Wireless' Intelligent Mobile Hotspot.

[12] Mobile Broadband customers who use VZAccess Manager also receive the following email message: "Mobile number [XXX-XXX-XXXX] has used at least 90% of its current Mobile Broadband plan's monthly data allowance. To get full details about the account's data usage, please have the account owner:

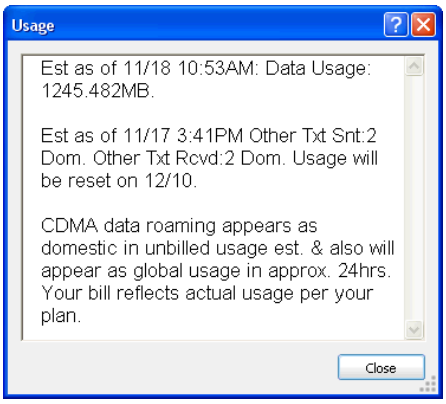
· Log on to VZAccess Manager and click Usage.







In addition, each time a customer launches VZAccess Manager, which allows Mobile Broadband customers to connect to the Internet on their laptop or netbook, that customer will be provided with their most recent data usage information for that billing cycle, including the end date of that billing cycle.



3. International Usage Management Tools.

As with domestic usage, Verizon Wireless provides consumers with information regarding its international services from a variety of sources. In particular, Verizon Wireless sends a free text message to customers when they turn on their phone in a foreign county that uses the same air interface as the customer's handset. This free text message welcomes the customer to the country, provides dialing instructions for calling from that country back to the

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· Sign on to your account at verizonwireless.com/myverizon.
· Give us a call at 1.800.XXX.XXXX."

U.S., and identifies the standard data rates for that country and the 24/7 customer service number for global customers. For example, customers who turn on their GSM-capable device in France receive the following free text message:

> Free Message. Welcome to France. Dial + 1 and the number to dial the US. Local Calls Dial (33) the City Code and the Number. For Roaming Support +1-908-559-4899. All pay per use data, including apps or tethering, is $0.02 KB or $20.48 MB.[13]

Verizon Wireless also regularly monitors the amount of each customer's international data usage. When a customer reaches $50 in data roaming charges, the following free notification will be sent:[14]

> VZW FREE MSG: As of mm/dd/yyyy, Mobile Number XXX-XXX-XXXX has incurred approx. $50.00 in data roaming charges. For plan options, visit www.verizonwireless.com/global or call +1-908-559-4899 to speak to a Global specialist.

Additional notifications will be sent when users reach $200, $500, $2000, and every $1500 thereafter in international data charges. Furthermore, customers may proactively control their international data usage directly by shutting off data services through the settings menu on their handset when travelling internationally, thereby preventing inadvertent international data roaming. Indeed, the global data roaming setting on all new devices currently being sold by Verizon Wireless is set to off, requiring customers to proactively change their settings to obtain data services in foreign countries.

In addition, consumers can access detailed international travel information from a single website—www.verizonwireless.com/global.[15] This website provides customers with the services

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[13] Verizon Wireless requires Mobile Broadband customers to click-through a similar disclosure screen in VZAccess Manager before being allowed to connect to the Internet outside of the U.S.

[14] This notification is sent in the form of a free text message to voice and data devices and an email message to data-only devices.

[15] *See* Exhibit 2 (screenshots of Verizon Wireless international services website).

available (and the costs for those services) in almost every country in the world. Coverage maps and lists of compatible voice, email, and Internet access devices for each country are also provided. Consumers can learn how to make calls and send text messages to and from other countries as well as connect to the Internet while travelling abroad. Verizon Wireless' Consumer Brochure also provides international services information and directs consumers to the global website for country-specific information.[16]

Finally, Verizon Wireless customers may always contact customer service with questions regarding international voice, messaging, and data services. Verizon Wireless has dedicated customer service representatives who can answer questions from customers using their service internationally—at any time day or night, seven days a week. These representatives also may assist customers who wish to change their global service plan or review service plan options.

B. Other Wireless Carriers Provide Similar Information and Tools to their Customers.

Verizon Wireless is not alone in its provision of usage management tools and information to consumers. Indeed, intense competition has led wireless carriers to provide consumers with information about customer's usage allowances as well as the ramifications of exceeding those allowances.[17] For example, AT&T's website provides detailed usage information to customers,

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16 *See* Exhibit 3 (international page of Consumer Brochure).

17 *See, e.g.*, Comments of T-Mobile USA, Inc., CG Docket No. 09-158 (filed July 6, 2010) ("T-Mobile Comments") ("T-Mobile recognizes that a customer suffering from 'bill shock' is unlikely to stay for long with the company that provided the unwelcome surprise. In today's competitive and evolving retail wireless marketplace, therefore, providers must regularly experiment with different methods of meeting their customers' information demands based on available and emerging technology, customer demographics, and other factors."); Comments of CTIA – The Wireless Association®, CG Docket No. 09-158, at 2 (filed July 6, 2010) ("The wireless industry's continuous introduction of consumer protection and account management tools are driven by rapidly-evolving consumer expectations in a dynamic marketplace. The account management tools detailed herein are satisfying the needs of the vast majority of

and customers may download an application that will include this information.[18] In addition, AT&T customers, before they sign up for service, receive a Customer Service Summary that explains the features of the service plans they have selected, including any usage limitations and costs that may apply.[19] Similarly, T-Mobile provides detailed information in its terms and conditions of service and online regarding the consequences of exceeding usage limits.[20]

Many carriers also have developed tools that allow customers to monitor and control their usage in various ways.[21] T-Mobile, for instance, sends free text alerts to customers when they are close to reaching or have reached their Whenever Minutes® bucket limit and offers several tools through which customers may monitor their usage.[22] Sprint similarly offers the Sprint Plan Optimizer, on-line alerts, blocking capabilities, Roaming Call Guard, and other tools that help consumers control their wireless usage.[23] In addition, AT&T sends courtesy alerts to its

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consumers through constant innovation spurred by the competitive marketplace."); Comments of Sprint Nextel Corporation, CG Docket No. 09-158, at 1-2 (filed July 6, 2010) ("Sprint Nextel Comments") ("Mobile service providers have a strong financial incentive to ensure their customers do not receive 'surprises' in their monthly bills. . . . Customers who receive unexpected charges tend to be unhappy customers – and unhappy customers rarely remain customers.").

18 Comments of AT&T, Inc., CG Docket No. 09-158, at 6 (filed July 6, 2010) ("AT&T Comments").

19 *Id.* at 3.

20 T-Mobile Comments at 8.

21 *See, e.g.*, CTIA Comments at 3-9; Reply Comments of Consumer Action and the National Consumers League, CG Docket No. 09-158, at 7-9 (filed July 19, 2010); Reply Comments of Verizon Wireless, CG Docket No. 09-158, at 3 (filed July 19, 2010).

22 T-Mobile Comments at 4-7 (also noting that it provides other tools that allow customers to control their usage including text message blocking, Web Guard, family allowances, and content blocking, among other things).

23 Sprint Nextel Comments at 5-6.

DataPlus and DataPro customers when they reach 65 percent and 90 percent of their monthly data allowance.[24] AT&T also sends courtesy alerts to its customers when they exceed their monthly messaging limits by $10 to $15 and to its legacy data customers when they exceed their monthly data allowance by $15.[25] And these are only a few of the usage management tools currently available to consumers.

The robust competition in the wireless marketplace empowers consumers by incenting providers to offer consumers detailed information regarding the services they offer, as well as innovative tools that allow consumers to control those services.

C. The Success of These Tools Is Demonstrated by Consumers' Satisfaction with their Wireless Services.

Consumers' pricing awareness is evidenced by their satisfaction with wireless services in general and Verizon Wireless in particular. The vast majority of American consumers are satisfied with their wireless service. The American Customer Satisfaction Index ("ACSI") has found that wireless consumer satisfaction is at an all-time high for the third year in a row.[26] Similarly, just last year, the Government Accountability Office reported to Congress that 84 percent of adult wireless phone users are very or somewhat satisfied with their wireless phone service.[27] Even the Commission's own survey concluded that 92 percent of wireless consumers

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[24] AT&T Comments at 7.

[25] *Id.*

[26] *See* American Customer Satisfaction Index, Scores by Industry, Wireless Telephone Services, *available at* http://www.theacsi.org/index.php?option=com_content&task=view&id=147&Itemid=155&i=Wireless+Telephone+Service (detailing wireless carrier and general wireless customer satisfaction scores for 2004 to 2010).

[27] U.S. Government Accountability Office, Testimony Before the Committee on Commerce, Science, and Transportation, United States Senate, *Preliminary Observations about Consumer Satisfaction and Problems with Wireless Phone Service and FCC's Efforts to Assist*

are satisfied overall with their wireless service.[28] In addition, customers are happy with the customer care they are receiving, as evidenced by the 2010 J.D. Power Customer Care Report, which revealed an average increase in carriers' customer care ratings,[29] and the 2010 Better Business Bureau Report, which concluded that 97.4% of wireless service complaints are satisfactorily resolved by wireless providers.[30]

Verizon Wireless' customers, in particular, are very satisfied with their service, as Verizon Wireless topped the ACSI survey for the seventh consecutive year, scoring above the industry average and placing higher than all other wireless carriers in both quality and loyalty.[31] Consumer Reports also recently identified Verizon Wireless as one of the best wireless service choices overall for most people.[32] Zagat similarly named Verizon Wireless as the top overall wireless carrier, finding Verizon Wireless led the industry in reliability, coverage, quality of voice and data services, customer service, store locations, and website.[33] Zagat also found that 92 percent of Verizon Wireless customers would recommend Verizon Wireless to a friend or

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Consumers with Complaints, at Highlights, 4, June 17, 2009, *available at* http://www.gao.gov/new.items/d09800t.pdf.

[28] *See* John Horrigan, More Free Data, BlogBand: The Official Blog of the National Broadband Plan (June 4, 2010), *available at* http://blog.broadband.gov/?entryId=479436.

[29] J.D. Power and Associates Reports: Wireless Customers with Additional Plan Options are Notably More Satisfied with Customer Care Performance, Press Release, Feb. 4, 2010, *available at* http://businesscenter.jdpower.com/news/pressrelease.aspx?ID=2010019.

[30] Complaints to Better Business Bureau Up Nearly 10 Percent in 2009, News Release, Mar. 8, 2010, *available at* http://www.bbb.org/us/article/complaints-to-better-business-bureau-up-nearly-10-percent-in-2009-18034.

[31] *See* Verizon Wireless, Awards & Accolades, *at* http://aboutus.vzw.com/awards.html.

[32] *See* Best Phones & Plans, Consumer Reports, at 36 (Jan. 2011).

[33] Zagat Survey Summary, Major Wireless Carriers Survey, *available at* http://www.zagat.com/downloads/pdf/pressStats/20100113_wireless.pdf.

family member.[34] Verizon Wireless also was named a leader in customer loyalty by Satmetrix's 2010 Annual Net Promoter® Benchmarks for Customer Loyalty.[35]

II. COMBINING COMPETITIVE PRESSURE WITH BETTER CONSUMER EDUCATION IS THE BEST APPROACH TO ENSURE CONSUMERS RECEIVE THE INFORMATION THEY NEED AND WANT.

The right model for oversight of today's vigorously competitive wireless market is to rely on providers' own clear incentives to satisfy consumers, not on prescriptive regulations that would limit the flexibility of providers to respond to consumers' evolving needs. As discussed above, the wireless industry is continuously responding to providers' strong business incentives by ensuring consumers have the information they want to monitor and control their usage. The challenge is to ensure that consumers are aware of the many tools and services that are already available today. The Commission therefore should focus its efforts on consumer education. By partnering with industry to develop a variety of informational tools for consumers, the Commission can help ensure consumers receive that information.

In order to respond to ever-changing consumer preferences, providers must have the flexibility necessary to tailor their communications with consumers. Thus, the appropriate model for meeting consumers' needs is to rely on providers' own incentives to satisfy consumers in a competitive market. Competitive pressures spur significant incentives for carriers to provide consumers with the information they need to make informed decisions throughout the carrier-customer relationship. These pressures foster competition among carriers as to the provision of billing and usage information to consumers, which benefits all consumers. This market-driven policy, by affording carriers the agility they need in order to give consumers what they want in

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34 *Id.*

35 *See* Verizon Wireless, Awards & Accolades, at http://aboutus.vzw.com/awards.html.

terms of information, correlates with high levels of consumer satisfaction, as highlighted above.[36]

In contrast, regulation that dictates when and what providers must say to consumers risks impeding competition and innovation. Worse, it would drive carriers toward a "lowest common denominator" approach that discourages the market differentiation that in turn promotes competition and innovation.

Academic work and the decisions of the Commission repeatedly conclude that regulation tends to limit the flexibility needed to respond to consumers' evolving needs and hinder innovation and competition. "[I]t is by now well appreciated that even well meaning regulation is a blunt instrument, which can impose its own considerable harm . . . [and] unacceptable collateral damage."[37] "Regulations create costs and constraints for market participants."[38] When compared with regulation, "[d]eregulation can achieve greater efficiency in entry and investment decisions, lower administrative costs, elimination of pricing distortions, increased innovation, and greater opportunities for customer choice."[39] Indeed, "regulation can discourage innovation and capital investment," whereas "[d]eregulation promotes innovation."[40]

The Commission has long recognized these regulatory externalities. Decades ago, "the Commission determined that regulation imposes costs on common carriers and the public, and

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36 *See supra* I.C.

37 M. Schwartz & F. Mini, *Hanging up on Carterfone: The Economic Case Against Access Regulation in Mobile Wireless*, at 2 (May 2, 2007), Ex. A to Reply Comments of AT&T, Inc., RM 11361 (filed May 15, 2007).

38 J. Gregory Sidak & Daniel F. Spulber, *Deregulation and Managed Competition in Networked Industries*, 15 Yale J. on Reg. 117, 125 (1998).

39 *Id.* at 120.

40 *Id.* at 140, 121.

that a regulation should be eliminated when its costs outweigh its benefits."[41] Since then, the Commission has made clear that regulatory intervention may interfere with consumers' ability to access new and innovative offerings.[42] And the Commission has emphasized that "regulation imposes costs on consumers to the extent it denies [a provider the] . . . flexibility it needs to react to market conditions and customer demands."[43]

Indeed, the Commission has expressly recognized the downsides of rigid rules in the context of consumer disclosures. When the Commission adopted the existing truth-in-billing rules, it explained that "there are typically many ways to convey important information to

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41 *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14297 (¶ 144) (1999) (discussing *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 FCC 2d 1, 3 (1980)); *see also id.* (explaining that "new service rules currently in effect limit incumbents' incentives to innovate" and "respon[d] to market forces," thus "impos[ing] costs on society by perpetuating inefficiencies in the market for interstate access services").

42 *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4802 (¶ 5) (2002) ("[B]roadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.") (quotation omitted) ("*Cable Modem Declaratory Ruling*"); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14855 (¶ 1) (2005) ("establish[ing] a minimal regulatory environment for wireline broadband Internet access services to benefit American consumers and promote innovative and efficient communications"); Brief of the Federal Petitioners at 31, *NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005) ("[H]eightened regulatory obligations could lead [broadband providers] . . . to raise their prices and postpone or forego plans to deploy new broadband infrastructure, particularly in rural or other underserved areas . . . [and] could also discourage investment in facilities."); *see also* Reply Brief of the Federal Petitioners at 18, *NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005) (emphasizing that the broadband market "has shown enormous growth under a hands-off regulatory regime"); Brief for Respondents, *Orloff v. FCC*, 352 F.3d 415 (No. 02-1189), 2003 WL 25588065, at *7 (D.C. Cir. Jan. 21, 2003) (regulation can "take away carriers' ability to make rapid, efficient responses to changes in demand . . . and remove incentives for carriers to introduce new offerings") (citation omitted).

43 *Revisions to Price Cap Rules for AT&T Corp.*, Report and Order, 10 FCC Rcd 3009, 3018 (¶ 27) (1995).

consumers in a clear and accurate manner,"[44] and deliberately followed a "flexible approach" to allow carriers to "satisfy the[] obligations in widely divergent manners that best fit their own specific needs and those of their customers."[45] The Commission well understood that carriers seek to "differentiate themselves . . . based on their billing practices"[46] by providing "creative and consumer-friendly billing formats,"[47] and it saw no need to stifle that sort of pro-consumer innovation. The Commission also observed the value of relying on industry to work with consumers in lieu of top-down government mandates, expressly leaving it to industry and consumer groups to design the particulars of the regulatory scheme.[48] Accordingly, the Commission rejected calls for a highly prescriptive approach, and chose instead to promulgate "broad, binding principles, rather than detailed comprehensive rules."[49]

The Commission's own truth-in-billing rules are thus an explicit recognition of the importance of flexibility and the defects inherent in inflexible rules in this very area. Tellingly, those rules have been in effect for over a decade, yet the Commission has not seen fit to replace them with the sort of prescriptive mandate it now proposes for alerts.

For all these reasons, the Commission should be mindful of the potential for regulation to restrain innovation, differentiation, and competition. This is particularly so in highly technical

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44 *Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7499 (¶ 10) (1999).

45 *Id.* at 7499 (¶ 9).

46 *Id.* at 7497 n. 16 (¶ 6).

47 *Id.* at 7497 (¶ 6).

48 *Id.* at 7519 (¶ 43) ("[I]ndustry is better equipped than the Commission to develop, in conjunction with consumer focus groups, standardized descriptions that are compatible with . . . the systems currently used for billing").

49 *Id.* at 7499 (¶ 10).

and dynamic fields such as the wireless market, where innovation and growth move substantially faster than administrative and regulatory processes.[50]

Instead, the FCC should partner with industry on joint education efforts designed to inform consumers about the types of usage management tools that are already available. As described in detail above, carriers already provide consumers with substantial information about the wide range of usage management tools available today. However, all consumers may not be aware of these tools.[51] As such, consumer education is critical. The FCC could help with this effort by releasing consumer tip sheets,[52] posting information about wireless carriers' existing usage management tools on its website, and hosting consumer education seminars as well. Verizon Wireless looks forward to partnering with the Commission and the rest of the industry in these efforts.

III. THE PROPOSED RULE WOULD BE UNLAWFUL.

The proposed regulation suffers from a number of legal infirmities. First, the Commission relies on flawed surveys and summaries of alleged consumer complaints that have not been placed in the record as justification for the proposed regulation. Adoption of the proposed regulation based on such insufficient support would violate the Administrative Procedure Act ("APA"). Indeed, the Commission's purported "evidence" of a widespread "bill

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50 *See, e.g.*, *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Further Notice of Proposed Rulemaking, 11 FCC Rcd 6235, 6272 (1996) ("Given the rapid pace of technological change, isn't it inevitable that there will be innovations that even the flexible ATSC Standard cannot accommodate?") (Separate Statement of Chairman Reed E. Hundt).

51 *See* NPRM at ¶¶ 2, 24.

52 The FCC released such a tip sheet last year to help educate consumers about international roaming charges. *See* FCC Tip Sheet: Wireless World Travel Made Simple, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298907A1.doc.

shock" problem demonstrates that this concern is being addressed by wireless providers and that a more appropriate regulatory response would be consumer education efforts. Second, neither Title II nor Title III of the Communications Act provides the Commission with the statutory authority to act. Finally, the proposed regulations raise significant First Amendment concerns. Accordingly, the Commission cannot legally adopt the proposed regulations.

A. The Rule Lacks the Factual Predicate Required by the Administrative Procedure Act.

Under the APA, an agency must offer a factual basis for any regulation it promulgates. Review of agency action includes scrutiny of the agency's asserted factual predicate (i.e., the alleged problem to be solved) because, as the D.C. Circuit has explained, "review would be a relatively futile exercise in formalism if no inquiry were permissible into the existence or nonexistence of the condition which the Commission advances as the predicate for its regulatory action. A regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."[53] When reviewing the agency's factual basis for an agency's action under the arbitrary and capricious standard, the "lodestar is the question whether the record as a whole provides substantial evidence to support the agency action."[54] "[T]he court must be able to conclude that the agency examined the relevant data and articulated

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[53] *City of Chicago v. Fed. Power Comm'n*, 458 F.2d 731, 742 (D.C. Cir. 1972). *See also ALLTEL Corp. v. FCC*, 838 F.2d 551, 559 (D.C. Cir. 1988) ("We cannot defer to the Commission's selection of a precise point on a scale when the scale itself has no relationship to the underlying regulatory problem.") (internal quotation marks omitted); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (same).

[54] *Morall v. DEA*, 412 F.3d 165, 178 (D.C. Cir. 2005); *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 606 (D.C. Cir. 2007) ("In sum, because the agency's decision . . . finds no support in the evidence the agency considered, we find it arbitrary and capricious.").

a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[55]

The NPRM relies on four items as justification for the proposed regulations: (1) its Bill Shock Survey,[56] (2) the recent GAO report,[57] (3) complaint data from the FCC[58] and the Better Business Bureau,[59] and (4) the record developed in response to the FCC's Public Notice on Bill Shock.[60] None of these items, however, provide a factual basis for the proposed regulation. To the contrary, several of these indicate that the wireless industry is effectively responding to any consumer concerns with respect to bill shock, rendering regulation unnecessary and inappropriate. And others do not justify the type of regulation proposed here.

First, as previously demonstrated by Dr. Joel Cohen, who is one of the leading experts on the design and conduct of consumer surveys,[61] the FCC's bill shock survey suffers from several

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55 *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dept. of Health & Human Servs.*, 396 F.3d 1265, 1276 (D.C. Cir. 2005) (internal quotation marks and alterations omitted). *See also Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. Aug. 28, 2009) ("We conclude the Commission has failed to examine the relevant data and articulate a satisfactory explanation for its action, and hold the 30% subscriber cap is arbitrary and capricious.") (quotation, citation, and alterations omitted).

56 NPRM at ¶¶ 2, 15.

57 *Id.*

58 *Id.* at ¶ 2.

59 *Id.* at ¶ 15.

60 *Id.* at ¶ 2.

61 Dr. Cohen is a leading scholar in the academic discipline of consumer behavior and recently received the Distinguished Service Award and the 2009 Best Article Award from the leading scholarly journal in the field, the *Journal of Consumer Research*. He is a Distinguished Service Professor Emeritus and former chairman of the marketing department at the University of Florida. As a recognized expert in survey research, Dr. Cohen has served as Director of Social and Behavior Science Research at National Analysts and as a consumer behavior and survey research consultant to the Federal Trade Commission.

major flaws and the FCC therefore cannot rely on it to justify regulation.[62] In that survey, the FCC concluded that one in six mobile users had experienced "bill shock."[63] As Dr. Cohen found, however, "[d]espite the FCC report's claim that the survey demonstrated "bill shock," the survey never in fact asked respondents whether they had experienced "shock" or even "surprise" about their wireless bill."[64] Instead, it only asked questions about increases in bills, but never asked questions about whether those increases were expected.[65] "For this reason alone, the FCC report's highly publicized conclusion is invalid."[66]

In addition, Dr. Cohen determined, "[t]he survey's methodology for determining eligibility to answer specific questions was tremendously flawed . . . [as the survey] does not consistently use sensible eligibility criteria (such as confirmed familiarity with bills they are asked about) [a]nd when any eligibility criteria (beyond the mere use of a cell phone) are used, they are minimal and subjective."[67] "There is [also] tremendous inconsistency throughout the report regarding how similar questions are asked. While some questions are open-ended, allowing people to provide their own best recall, other times interviewers read lists providing

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62 Exhibit 4, Joel B. Cohen, The FCC Survey: What the Data Can Tell Us about "Bill Shock" and Early Termination Fees (July 2010) ("Cohen Analysis"), also attached to Reply Comments of Verizon Wireless, CG Docket No. 09-158 (filed July 19, 2010); Exhibit 5, Joel B. Cohen, Response to Princeton Survey Research Associates International's September 3, 2010 Ex Parte Filing (Sept. 2010), also attached to Letter from Donna Epps, Verizon, to Marlene H. Dortch, FCC, CG Docket No. 09-158 (filed Sept. 23, 2010).

63 FCC Survey Confirms Consumers Experience Mobile Bill Shock and Confusion about Early Termination Fees, New Release (May 26, 2010).

64 Cohen Analysis at 2.

65 *Id.*

66 *Id.*

67 *Id.*

ranges of responses that respondents may never have considered."[68] Dr. Cohen also documented the survey's failure to allow respondents to say they have no opinion on a question. Based on these and other defects, Dr. Cohen concluded that the survey does not support the Commission's statements regarding "bill shock."[69] The FCC's survey therefore provides no justification for the proposed rules.[70]

Second, while the GAO report found that a number of consumers have received unexpected charges on their wireless bills, the proposed regulations are not necessarily designed to address this concern.[71] As noted by the Commission, a GAO survey found that 34 percent of wireless subscribers had experienced unexpected charges on their wireless bills.[72] In conducting this survey, however, the interviewers did not ask the cause or the amount of the unexpected charge. Thus, while these unexpected charges could be the result of overages, they could also be the result of downloads, taxes, fees, or a number of other things. A more appropriate response to such data, therefore, would be improved customer education that ensures customers are aware of what is (and is not) included in their monthly bill as well as how to avoid overage and download charges, as proposed above.[73]

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68 *Id.*

69 *Id.* ("Verizon Wireless asked me to review the survey data made available by the FCC to determine whether the data adequately supported the agency's claims and conclusions. In my opinion, they do not.").

70 While Dr. Cohen's analyses were submitted into the record developed in response to the Commission's "Bill Shock" Public Notice, the NPRM ignores them, casting further doubt on the validity of the Commission's Bill Shock Survey and raising additional APA concerns.

71 GAO, FCC Needs to Improve Oversight of Wireless Phone Service, GAO-10-34 (Nov. 2009).

72 NPRM at ¶¶ 2, 8, 15.

73 *See supra* Section II.

Dr. Cohen has also analyzed the GAO study and has concluded that it, too, has methodological problems. Dr. Cohen concludes: "A careful analysis of the survey . . . demonstrates that the survey (1) had an extremely low response rate (that prevents any confident projection to the larger cell-phone population), (2) improperly relied on participant recall, and (3) possessed a number of flaws that produce biased responses. Therefore, the factual support for the 34% and 31% figures as estimates of unexpected charges and reported difficulty understanding of bills (especially in the larger population of wireless users) is inadequate. In addition, the questions that were appropriately structured show that consumers are satisfied with their wireless service and that carriers are responding to customers' billing concerns when they do arise."[74] This analysis raises significant questions regarding the FCC's reliance on the GAO report to justify the proposed regulations.

Third, the FCC improperly relies on complaints submitted to the FCC and the Better Business Bureau. Specifically, earlier this year, the FCC found that 765 people submitted complaints to the FCC about wireless bill shock in the first half of 2010. As an initial matter, because the FCC has not publicly released these complaints nor placed them in the record, it cannot rely on them at all to justify the proposed rules.[75] In any event, this number represents less than 1/1000th of 1 percent of 292.8 million wireless connections.[76] In addition, the FCC

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[74] Exhibit 6, Joel B. Cohen, The GAO Survey: What the Data Can Tell Us about "Unexpected" Charges and Consumer Billing Concerns, at 2 (January 2011).

[75] Without these complaints being made public, there is no way for a reviewing court to adjudge the reasonableness of the inferences the Commission attempts to draw therefrom in support of its regulation of speech. *See infra* n. 146 (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 666 (1994)).

[76] *See* CTIA – The Wireless Association®, Wireless Quick Facts, *at* http://www.ctia.org/media/industry_info/index.cfm/AID/10323 (292.8M wireless subscriber connections in June 2010).

cites the Better Business Bureau's 2009 Annual Report, which found that the wireless industry received the largest number of complaints in 2009 (reporting 37,477 complaints from the 292.8 million wireless connections or approximately 1/10th of 1 percent of all wireless connections), as justification for the proposed rules.[77] Absolute numbers of complaints, of course, are irrelevant—an industry with fewer total customers would typically have fewer total complaints but the percentage of complaints could be far higher. This number, moreover, indicates overall complaints and does not represent consumer complaints regarding bill shock. In addition, the Better Business Bureau found that the wireless industry has the highest percentage of resolved wireless complaints (97.4%).[78] Based on these data, the wireless industry is effectively responding to consumer complaints, including those regarding bill shock, when they do occur.

Finally, the Commission claims that the record developed in response to the Bill Shock Public Notice justifies adoption of the proposed regulation.[79] That record, however, is devoid of evidence of a widespread problem. Instead, those supportive of regulation merely rely on rhetoric, the Commission's flawed "bill shock" survey, and a small handful of extreme cases.[80] These few examples do not warrant regulation since carriers already address specific instances as they arise. While commenters agreed that consumers should have access to clear information

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77 NPRM at ¶ 15.

78 Complaints to Better Business Bureau Up Nearly 10 Percent in 2009, News Release, Mar. 8, 2010, *available at* http://www.bbb.org/us/article/complaints-to-better-business-bureau-up-nearly-10-percent-in-2009-18034.

79 NPRM at ¶ 2.

80 *See* Comments of the Utility Consumers' Action Network, CG Docket No. 09-158 (filed July 6, 2010); Comments of The Center for Media Justice et al., CG Docket No. 09-158 (filed July 6, 2010); Comments of Consumer Action and the National Consumers League, CG Docket No. 09-158 (filed July 6, 2010); Reply Comments of Consumer Action and the National Consumers League, CG Docket No. 09-158 (filed July 19, 2010).

regarding their wireless usage,[81] the record showed that intense competition has led wireless carriers to provide consumers with usage information.[82] Providers of all sizes therefore have made this information available,[83] and many have developed tools that allow customers to

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81 *See, e.g.*, Comments of the Massachusetts Office of the Attorney General and the Massachusetts Department of Telecommunications and Cable, CG Docket No. 09-158 (filed July 6, 2010) ("It is critical that consumers have access to information about the services to which they subscribe, their usage, and how their usage will affect their monthly bills."); Comments of Rural Cellular Association, CG Docket No. 09-158 (filed July 6, 2010) ("RCA Comments") ("RCA agrees that consumers should have the benefit of relevant information pertaining to the provision of wireless services and choice.").

82 *See, e.g.*, Comments of T-Mobile USA, Inc., CG Docket No. 09-158 (filed July 6, 2010) ("T-Mobile Comments") ("T-Mobile recognizes that a customer suffering from 'bill shock' is unlikely to stay for long with the company that provided the unwelcome surprise. In today's competitive and evolving retail wireless marketplace, therefore, providers must regularly experiment with different methods of meeting their customers' information demands based on available and emerging technology, customer demographics, and other factors."); Comments of CTIA – The Wireless Association®, CG Docket No. 09-158, at 2 (filed July 6, 2010) ("The wireless industry's continuous introduction of consumer protection and account management tools are driven by rapidly-evolving consumer expectations in a dynamic marketplace. The account management tools detailed herein are satisfying the needs of the vast majority of consumers through constant innovation spurred by the competitive marketplace."); Comments of Sprint Nextel Corporation, CG Docket No. 09-158, at 1-2 (filed July 6, 2010) ("Sprint Nextel Comments") ("Mobile service providers have a strong financial incentive to ensure their customers do not receive 'surprises' in their monthly bills. . . . Customers who receive unexpected charges tend to be unhappy customers – and unhappy customers rarely remain customers.").

83 *See, e.g.*, Comments of AT&T, Inc., CG Docket No. 09-158, at 3 (filed July 6, 2010) ("AT&T Comments") (noting that AT&T customers receive a personalized, easy-to-read Customer Service Summary before they sign up for service that explains the features of the rate plan he has selected, including any usage limitations and costs that may apply); Sprint Nextel Comments at 3-4 (detailing the information Sprint provides customers at the point of sale and in the first 30 days after sale); T-Mobile Comments at 8 (stating that T-Mobile offers detailed information regarding the consequences of exceeding usage limits in its terms and conditions of service and online); RCA Comments at 2, 4 ("RCA Carrier members provide their customers with accurate and detailed account and billing information, both on their monthly bills and through online resources. . . . [S]everal RCA members have voluntarily agreed to disclose rates and terms of service to consumers at the time of the sale and on their websites, including monthly access charges, number of minutes in the calling plan, charges for overages, roaming charges, and other charges collected by the carrier."); Comments of Verizon Wireless, CG Docket No. 09-158, at 13-18 (filed July 6, 2010) ("Verizon Wireless Comments").

monitor and control their usage in various ways.[84] In addition, the record demonstrated that the competitive wireless market drives providers to listen to consumers and take directly responsive measures to provide the kind of information in the format that consumers prefer and continually update those measures.[85] Thus, the record developed in response to the Commission's Public Notice proves the exact opposite of what the Commission asserts. In fact, consumers have numerous tools to monitor and control their wireless usage and carriers are already responding to consumers concerns when they do arise by updating and expanding the information and tools they provide consumers.

Accordingly, the FCC has not justified new regulation. None of the purported "data" on which the new rule is premised supply the requisite factual justification needed to comply with the APA. The rule would thus constitute arbitrary and capricious agency action.

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[84] *See, e.g.*, Verizon Wireless Comments at 2-12; T-Mobile Comments at 4-7 (noting that T-Mobile sends free text alerts to customers when they are close to reaching or have reached their Whenever Minutes® bucket limit, offers several tools over which customers may monitor their usage, and provides other tools that allow customers to control their usage including text message blocking, Web Guard, family allowances, and content blocking, among other things); Sprint Nextel Comments at 5-6 (describing the tools Sprint offers customers to help them control their usage including the Sprint Plan Optimizer, on-line alerts, blocking capabilities, Roaming Call Guard, and other tools); AT&T Comments at 5-8 (detailing the services AT&T offers to assist customers in tracking their usage and billing including its online account management system and courtesy alerts).

[85] For example, Verizon Wireless modified the design and content of its confirmation letters and pricing grids based on customer feedback, ultimately improving customer comprehension of the fees associated with Verizon Wireless' services and overall satisfaction. Verizon Wireless Comments at 18. Sprint and T-Mobile have similarly indicated that they are constantly striving to improve the information and tools they provide customers. *See* T-Mobile Comments at 9-10 ("Not only does T-Mobile currently offer a wide variety of monitoring tools, including usage alerts in many circumstances, it is constantly assessing the value of additional mechanisms to keep consumers informed and pleased with our service."); Sprint Nextel Comments at 15 ("Sprint and its competitors, in a never-ending desire to retain customers and increase customer satisfaction, continue to revise their methods of sharing information with customers (without overwhelming them), and carriers compete with each other to find the approach consumers find most effective.").

B. The FCC Lacks Statutory Authority to Adopt the Rule.

As an initial matter, the scope of the proposed regulations is vague in that they would apply to "mobile service provider[s]," an as-yet wholly undefined term.[86] Because the Commission's authority generally varies depending on both the nature of the regulated entity and the regulated service,[87] it is difficult to comment on the question whether the Commission possesses statutory authority to promulgate these regulations without knowing the identity of the regulated entities. That said, it is clear that nothing in the Act authorizes the Commission to promulgate the proposed consumer-protection rules,[88] regardless of the definition of "mobile service providers" that is ultimately adopted. That is so for two reasons: (1) Title III contains no substantive grant of authority for the Commission to engage in the consumer-protection type of regulation that it envisions here; and (2) the Commission cannot rely on its Title II authority because there is no lawful basis for the exercise of common-carrier authority here.

1. Title III Does Not Provide Authority for the Rule.

Title III contains no substantive grant of authority for the Commission to regulate the business relationship between wireless carriers and subscribers. This is by design. Indeed, the

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86 *See* NPRM at App. A (reserving subsection (b) of proposed rule for the definition of "mobile service provider").

87 *See, e.g.*, 47 U.S.C. § 332(c)(2) ("A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act."). Under this provision, the Commission's authority to impose regulations with respect to PMRS is more limited than its authority to regulate CMRS.

88 That the proposed rules are consumer-protection rules is clear. Indeed, the very first sentence of the NPRM explains that the purpose of the rule is to "assist consumers in avoiding unexpected charges." NPRM at ¶ 1; *id.* at App. A (text of subsection (a) of proposed rule); *see also id.* (separate statement of Commissioner Copps) ("It's always great to start an agenda meeting with a consumer item, because these items reflect our fundamental mission—that is to protect consumers.").

entire purpose of Title III, as originally enacted, was to create a federal licensing regime in order to have an orderly system for spectrum management and to resolve the interference problems that had plagued broadcasting in the absence of centralized coordination of the radio waves. Thus, the historical reason for Title III was to provide for the efficient and orderly use of spectrum, *not* to regulate the relationship between a licensee and its customers.

As the Supreme Court explained in *FCC v. Sanders Bros. Radio Station*, "[t]he fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license."[89] The Court further explained that

> the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone.[90]

Accordingly, Congress plainly enacted Title III in order to empower the Commission to manage the airwaves.[91] A provision that is not directly related to the licensing of and transmission over spectrum is simply not contemplated in Title III (unless otherwise explicitly stated by Congress). Congress, therefore, did not empower the Commission to regulate the manner in which broadcasters conducted business generally, much less grant it the power to

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89 *See FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

90 *Id*.

91 *See* 47 U.S.C. § 301 (1934) ("It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority . . . .").

regulate the details of the relationship with the customer.[92] To the contrary, in Title III, Congress intended to "permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."[93] Just as in selecting programming, decisions such as sending alerts for wireless services are competitive differentiators best left to the market so that licensees can make those decisions according to their view of what consumers want. And this is precisely why, sixty years later, Congress needed to import Title II's common-carrier regulation into Section 332(c) when it wanted to give the Commission some measure of regulatory authority over the relationship between CMRS providers and their subscribers.[94] Had Title III already included such authority, there would have been no reason for Congress to do so.[95]

The Commission nevertheless suggests that Sections 301, 303(b), 303(r), 307(a), or 316(a) provide it with authority for the proposed consumer-protection regulations.[96] But none of these provisions grants the Commission authority to promulgate the proposed rule. Indeed, each cited provision is inapplicable by its terms. Section 301 is a general statement of purpose and description of the Commission's general jurisdiction over radio transmission. It is not a

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92 *Sanders Bros.*, 309 U.S. at 475 ("[T]he Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy.").

93 *Id.* at 475.

94 *See* 47 U.S.C. § 332(c)(1).

95 To construe Title III to include such authority would improperly render superfluous Section 332(c)'s incorporation of Title II obligations for CMRS providers. This is not a legitimate construction of the statute. *See Conn. Dep't of Income Maint. v. Heckler*, 471 U.S. 524, 530 n.15 (1985) ("It is a familiar principle of statutory construction that courts should give effect, if possible, to every word that Congress has used in a statute.").

96 *See* NPRM at ¶ 27.

substantive grant of authority at all, much less one that would authorize the Commission to compel and regulate speech. The Commission's Section 303(b) authority "to prescribe the nature of service" goes to the Commission's basic authority to establish different types of services that can be offered by radio, such as commercial wireless radio service or ship-to-shore radio service, but does not authorize detailed notifications about a subscriber's usage of wireless service, which have nothing to do with the "nature of service" itself.[97] Section 303(r) also is not a grant of substantive authority; but simply an enabling provision that allows the Commission to take such action as is necessary to carry out an actual grant of substantive authority from elsewhere in Title III.[98] Section 307(a) permits the Commission to issue licenses, not to alter or condition the terms of licenses already held by existing licensees.[99] And although Section 316(a) governs the modification of licenses, it relates to *individual* licenses and affords licensees important procedural protections—including an adjudicatory procedure that must be followed whenever the Commission seeks to modify a license.[100] Thus, none of these provisions vests the

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97 47 U.S.C. § 303(b) ("Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall--(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class[.]").

98 47 U.S.C. § 303(r) ("Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall--(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, *as may be necessary to carry out the provisions of this chapter*") (emphasis added). "The FCC must act pursuant to delegated authority before any 'public interest' inquiry is made under §303(r)." *MPAA v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002).

99 47 U.S.C. § 307(a) ("The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.").

100 47 U.S.C. § 316(a). Section 316 provides that no modification "shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefore, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification." *Id*.

Commission with authority to regulate when and how carriers communicate with their customers regarding service usage.

Moreover, the Commission cannot properly infer statutory authority for the proposed rules from these provisions or from any other provision of Title III. The only provision of the Communications Act that relates to carrier practices with respect to billing is Section 201(b).[101] There being no analogue to Section 201(b) in Title III, the proper conclusion is that this authority does not exist in Title III.[102] Finally, because the proposed rules implicate the First Amendment,[103] it should not lightly be presumed that Congress implicitly delegated to the Commission the authority to abridge the freedom of speech.[104] "Congress . . . does not, one might say, hide elephants in mouseholes."[105] Given the absence of any statutory language even addressing how wireless providers are to inform their customers about services in the provisions of Title III cited in the NPRM, any reliance on these provisions to adopt the proposed rules would violate the constitutional non-delegation doctrine, which requires at least some limiting principle in delegations of agency authority.[106]

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101 47 U.S.C. § 201(b) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.").

102 As noted above, Congress's decision to apply Section 201 to CMRS providers through Section 332(c) confirms that this type of authority did not exist anywhere in Title III.

103 *See infra* Section III.C.

104 *See MPAA*, 309 F.3d at 806 ("Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating [the First Amendment].").

105 *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

106 *American Trucking.*, 531 U.S. at 472; *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

2. Title II Does Not Provide Authority for the Rule.

The Commission cannot properly rely on its Title II authority for two separate reasons. First, the proposed regulations purport to apply to wireless voice, data, and text messaging services. But Title II does not reach wireless data or text messaging services because they are information services. Second, while Section 201(b) theoretically could serve as a basis for promulgating the proposed regulations with respect to wireless voice service, that would require a finding that existing carrier practices with respect to usage notifications are "unjust or unreasonable," which the Commission has not even suggested.

The Commission appears to contemplate Sections 201 and 258 as a source of authority for the proposed regulations.[107] This is perhaps in recognition that the proposed regulations relate to billing practices and the Commission's truth-in-billing regulations were promulgated pursuant to Sections 201 and 258.[108] But these provisions cannot authorize the Commission to promulgate the proposed regulations, which would apply to non-Title II services.[109]

The Commission cannot exercise Title II authority with respect to data or text messaging services. The Commission has previously concluded that data services are "information services,"[110] which removes them from the reach of Title II common-carrier regulation.[111] As

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[107] *See* NPRM at ¶ 28 ("[W]hat other provisions of the Act, in Title II or elsewhere, would provide the Commission additional authority to impose bill shock-related obligations?"); *id.* at ¶ 35 (mentioning Sections 201 and 258 in the NPRM's ordering clauses).

[108] *Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7503 (¶ 21) (1999) ("We find that our authority to enact the truth-in-billing guidelines set forth herein stems from both section 201(b) and section 258 of the Act.").

[109] *See* NPRM at App. A (applying subsection (c) usage notification rule to "voice, text, and data usage").

[110] *Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5908-10 (¶¶ 19-28) (2007) ("*Wireless Broadband*

the Commission explained, wireless broadband Internet access services—like their wireline and cable analogues—"combine[] the transmission of data with computer processing, information provision, and computer interactivity, for the purpose of enabling end users to run a variety of applications."[112] Also, data services are not interconnected and thus cannot be considered CMRS under Section 332(d),[113] and cannot be subject to regulation under Section 201 (through Section 332(c)(1)(A)).

Similarly, text messaging is an information service. It falls within the statutory definition because it requires the "storing" and "retrieving" of information and involves "transforming" message content.[114] Moreover, text messaging service—like data service—is not interconnected and thus not CMRS under Section 332.[115] For these reasons, text messaging service is outside the reach of Title II and cannot properly be subject to common-carrier regulation.

Although wireless voice service is subject to Section 201 through Section 332(c)(1)(A), the Commission cannot properly exercise Section 201 authority to apply its proposed regulations

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Order") ("[W]ireless broadband Internet access service is an information service under the Communications Act of 1934.").

111 *See* 47 U.S.C. § 153(44) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.").

112 *Wireless Broadband Order*, 22 FCC Rcd at 5911.

113 47 U.S.C. § 332(d) (defining CMRS as making available "interconnected service," which is defined in relevant part as "service that is interconnected with the public switched network").

114 *See* 47 U.S.C. § 153(20) ("The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.").

115 47 U.S.C. § 332(d).

to wireless voice service. By its terms, Section 201(b) requires a finding that wireless carriers' current disclosures are "unjust and unreasonable" before the Commission may properly impose usage notification requirements on wireless voice services.[116] The NPRM does not suggest such a finding nor even seek comment on how Section 201 might apply. It clearly does not.

C. The Rule Raises Serious First Amendment Concerns.

The First Amendment protects both the right to speak and the right *not* to speak.[117] This right extends to any form of expression "convey[ing] a particularized message" that is likely to "be understood by those who viewed it."[118] In addition, speech need not address a political controversy to qualify for First Amendment protection.[119] Even speech regarding purely factual "information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection."[120] Thus, rules compelling even the transmission of purely factual

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116 47 U.S.C. § 201(b) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful."); *see also Truth-in-Billing and Billing Format*, 14 FCC Rcd at 7571 (Commissioner Furchtgott-Roth dissenting) ("Given the utter failure to find either the labels or charges 'unjust and unreasonable,' it is difficult to see how the regulations concerning standardized labels could be adopted since section 201(b) is the sole source of authority . . . .").

117 *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 413 U.S. 557, 573 (1995).

118 *Spence v. Washington*, 418 U.S. 405, 410-11 (1974); *see also Kaplan v. California,* 413 U.S. 115, 119-20 (1973) (explaining that the protection afforded to "freedom of speech" under the First Amendment extends to "pictures, films, paintings, drawings, and engravings").

119 *See Miller v. California*, 413 U.S. 15, 34 (1973).

120 *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446-47 (2d Cir. 2001). Accordingly, courts have consistently held that First Amendment protection extends to "dry factual information" such as computer programs, instructions, formulas, do-it-yourself manuals, and recipes. *See, e.g.*, *Corley*, 273 F.3d at 447 (concluding that "computer programs" that were written "in code" constituted protected speech); *Bernstein v. United States Department of State,* 922 F. Supp. 1426, 1435 (N.D. Cal. 1996) (concluding that "[i]nstructions, do-it-yourself manuals, [and] recipes" are all "speech"); *New.net, Inc.*, 356 F. Supp. 2d at 1082 (finding computer software that delivered messages to purchaser protected speech).

information to consumers directly implicates speech protected under the First Amendment. Notably, the more prescriptive and heavy-handed the regulation of carrier speech, the more problematic that regulation will be under the First Amendment.

The Supreme Court recently made clear that corporations are entitled to the full protection of the First Amendment and that not all corporate speech can be classified as mere commercial speech.[121] And, like other speakers, corporations are entitled to speak or refrain from speaking, irrespective of the type of speech at issue.[122] Although "commercial speech" may sometimes warrant lesser protection than other forms of speech, so long as the regulated speech is not inherently misleading or related to unlawful activity, the government bears the burden of proving that: (1) its asserted governmental interest is "substantial;" (2) its speech regulation "directly advance[s]" that interest; and (3) its regulation is not more extensive than necessary to serve that interest.[123] Finally, "[t]he party seeking to uphold a restriction on

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121 *See Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010); *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

122 *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1985) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say."); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995); *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 763 (1976).

123 *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980) (quotation omitted). To escape this three-prong test, it is not enough that the restricted speech may be *potentially* misleading. *See Peel v. Atty. Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 109 (1990). Indeed, though the Supreme Court has authorized a lower level of scrutiny for compelled disclosures designed to prevent the deception of customers, *see Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010), it has made clear that such regulation must be reasonably related to the government's interest in preventing deception of consumers. *See Milavetz*, 130 S. Ct. at 1339-40. *Milavetz* makes clear that where the regulated statements "[a]re not inherently misleading," *Central Hudson*, rather than this more lenient standard, applies. There is no suggestion that providers' present communications with customers regarding usage are inherently misleading. Thus, *Zauderer* and *Milavetz* have no application here.

commercial speech carries the burden of justifying it,"[124] and this burden "is not satisfied by mere speculation or conjecture."[125] The government cannot regulate speech in the absence of an actual problem to be addressed by the proposed regulation.[126]

The proposed regulations undoubtedly regulate protected speech. They compel mobile service providers to communicate with customers about their service usage[127] and the tools and services that can be used to monitor their service usage.[128] Such notifications regarding service usage and features for monitoring usage constitute speech because they "convey a particularized message" that "would be understood by those who viewed it,"[129] and are akin to instructions and other forms of expression clearly considered "speech" under the First Amendment.[130] Because the proposed regulations burden protected speech, they raise serious First Amendment concerns.

Even assuming that the speech the Commission proposes to regulate is "merely" commercial speech,[131] the proposed regulations still must pass *Central Hudson* scrutiny. The

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124 *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71, n. 20 (1983).

125 *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

126 *Id.* at 770-71 ("[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.").

127 *See* NPRM at App. A (subsection (c) of the proposed rule).

128 *See id.* (subsection (d) of the proposed rule).

129 *Spence*, 418 U.S. at 410-11.

130 *See Corley*, 273 F.3d at 445-47.

131 The proposed rules arguably do not fall within the definition of commercial speech—speech that "does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy*, 425 U.S. at 762; *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (same); *see also Board of Trustees of State Univ. of NY v. Fox*, 492 U.S. 469, 482 (1989) ("[S]peech that *proposes* a commercial transaction . . . is what defines commercial speech."); *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 973 (D.C. Cir. 1990) ("[C]ommercial speech is speech

Commission bears the burden of satisfying all three prongs of the *Central Hudson* test; it must assert a substantial government interest, its regulations must directly advance that interest, and its regulations must be sufficiently tailored so that they are no more extensive than necessary to serve that interest. A failure as to any single prong dooms the proposed regulations.

As to the first prong of the test, the Commission has not clearly articulated its interest, much less explained how it is "substantial." Judging by the stated purpose of the proposed rule, it would appear that the Commission's interest is in "providing usage alerts and information that will assist consumers in avoiding unexpected charges on their bills."[132] The Commission did not, however, explain how or why this constitutes a "substantial" interest under the First Amendment.[133] This is especially so, considering that the NPRM did not suggest that providers

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which does no more than propose a commercial transaction."). *But see Central Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980) ("expression related solely to the economic interests of the speaker and its audience"). The D.C. Circuit looks to the three-part inquiry set forth in *Bolger v. Youngs Drug Prod. Co.*, 463 U.S. 60 (1983), to determine whether speech is commercial. Under this test, "speech that is concededly an advertisement, refers to a specific product, and is motivated by economic interest may be properly characterized as commercial speech." *SEC v. Wall St. Publ'g Inst., Inc.*, 851 F.2d 365, 372 (D.C. Cir. 1988) (citing *Bolger*, 463 U.S. at 66-67). Applying the *Bolger* test, usage notifications and disclosures regarding the tools to monitor such usage do not appear to be commercial speech. They are not advertisements for a specific product based on a profit motive but, rather, provide information in the interest of maintaining positive customer relations regarding the usage of a product and the features for monitoring that usage. Thus, the speech at issue here should not be considered "commercial speech," especially give Justice Stevens' warning against defining the commercial speech doctrine "too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed." *Central Hudson*, 447 U.S. at 579 (Stevens, J., concurring).

[132] NPRM at ¶ 1.

[133] If the government's interest in shielding members of the public "from materials that they are likely to find offensive" is not substantial, *see Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71-72 (1983), it would seem that the interest in providing members of the public with information they might find helpful is not substantial either.

are communicating inaccurate or misleading information to subscribers.[134] If the interest in providing members of the public with helpful information were deemed "substantial," it would likely support all manner of speech regulation. To avoid the risk of undermining the First Amendment's protection of free speech, this interest should not be deemed "substantial."

In any event, whether this interest is "substantial" is not an abstract question. In articulating its asserted interest, "the Government must present more than anecdote and supposition."[135] Instead, the government must "specifically articulate[] and properly justif[y]" its asserted interest.[136] As explained above,[137] there is insufficient evidence "demonstrat[ing] the harms [the Commission] recites are real."[138] Accordingly, there is also no constitutionally adequate justification for the proposed regulations.

The second and third prongs of the *Central Hudson* analysis focus on the relationship between the asserted government interest and the actual effect of the speech regulation;[139] the proposed regulations must "directly advance[]" the asserted government interest without being "more extensive than is necessary to further [that] interest."[140] As to the direct advancement

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134 *Cf. Edenfield v. Fane*, 507 U.S. 761, 769 (1993) ("[The State]'s interest in ensuring the *accuracy* of commercial information in the marketplace is substantial.") (emphasis added).

135 *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822 (2000); *see also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured.") (citation and quotation omitted).

136 *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1235 (10th Cir. 1999).

137 *See supra* Section III.A.

138 *Edenfield*, 507 U.S. at 771.

139 *Central Hudson Gas & Elec. Corp*., 447 U.S. at 569.

140 *Id*.

prong, the Commission "must demonstrate . . . the regulation will in fact alleviate [the asserted] harms in a direct and material way."[141] Importantly, this demonstration must be based upon "substantial evidence" and "reasonable inferences" drawn therefrom.[142] Ultimately, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."[143] Speech regulation that provides only a "marginal degree of protection" over existing protections is insufficient.[144]

Even assuming the Commission has a substantial interest in "assist[ing] consumers in avoiding unexpected charges on their bills,"[145] it has not shown, as it must before regulating speech, that the rule would directly and effectively advance that interest. As explained above, the evidence the Commission has cited in support of the proposed notification rules is anecdotal and/or unreliable.[146] The most reasonable inference that may be drawn from the available

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141 *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993); *see also Kinney v. Weaver*, 367 F.3d 337, 362 (5th Cir. 2004) ("[T]he relevant issue is not the weight of the governmental interest considered in abstract terms; we look instead to how the speech at issue *affects* the government's interest.").

142 *Turner I*, 512 U.S. at 666.

143 *Central Hudson Gas & Elec. Corp*., 447 U.S. at 564.

144 *Bolger*, 463 U.S. at 73.

145 NPRM at ¶ 1.

146 The Commission's Bill Shock Survey and the GAO Report both suffer from flawed methodology and thus are unreliable. The complaint data from the Better Business Bureau is unreliable as well; it grossly overstates the "problem" of bill shock by including *all* complaints rather than only those reporting bill shock. Likewise, the Commission's complaint data is unreliable because the Commission has never made the substance of this data public (even in redacted form), only reporting the raw number of complaints. Without that substance being made public, there is no way for commenters or, more importantly for constitutional purposes, a reviewing court to adjudge whether the inferences the Commission attempts to draw from these sources are reasonable. *See Turner I*, 512 U.S. at 666. Thus, the Commission cannot rely on these complaints as evidence of the requisite substantial interest. In addition, the number of complaints is at best a *de minimis* amount of complaints (765) when compared with the number

evidence is that wireless consumers are pleased with their wireless service and with the customer care they receive.[147] To the extent that any of the Commission's cited evidence reveals any sort of "problem," it is a lack of consumer education on how to monitor and avoid overages.[148] Providing consumers further information about the means of monitoring their usage might, at least theoretically, alleviate this "problem." However, none of the Commission's cited data indicates that its proposed usage-notification rules will "directly and materially" advance the Commission's asserted interest in helping consumers avoid unexpected overages.[149] None of it purports to connect the asserted bill shock "problem" to inadequate access to information about subscriber usage. Nor is there any evidence that consumers want any information other than the notifications and other information they currently receive from their providers.[150] Given the fact that consumers are already well-served by the existing usage notification and management tools provided to them by Verizon Wireless and other carriers,[151] any additional benefit to consumers

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of wireless connections across the country (over 290 million). Further, the record developed in response to the Commission's Public Notice in this proceeding is merely anecdotal. *See supra* Section III.A.

147 *See supra* Section I.C.

148 *See supra* Section III.A.

149 *Edenfield*, 507 U.S. at 770.

150 Subscribers might well ignore or delete different or additional notifications required by any Commission rule.

151 *See supra* Sections I.A.-I.B.; *see also* Consumer Tip: How to Manage Your Wireless Account, *available at* http://www.ctia.org/blog/index.cfm/2010/5/12/Consumer-Tip-How-to-Manage-Your-Wireless-Account.

from the Commission's usage-notification rules would be minimal at best. Such "limited incremental support" is not enough to sustain the regulation of commercial speech.[152]

Moreover, there is no documented benefit to be obtained from the usage-notification rules. Forcing providers to make additional disclosures to their subscribers runs the risk of confusing subscribers and subjecting them to information overload. More information is not always better for consumers. Indeed, numerous studies have confirmed that consumers reach a saturation point when it comes to informational disclosures; at some point, more information actually diminishes consumer knowledge.[153]

Likewise, the more requirements that the Commission adopts as part of its usage notification rule, the more likely the rule will be "more extensive than is necessary" and thus fail the tailoring prong of the *Central Hudson* test.[154] It is worth emphasizing that the Commission bears the burden of demonstrating that its interest cannot be adequately served by a less burdensome regulation.[155] Thus, the Commission must demonstrate that its interest in helping consumers avoid unexpected overages cannot be adequately served by the competitive efforts of wireless carriers (which result in the provision of increasingly pro-consumer notifications and

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[152] *Bolger*, 463 U.S. at 73. The potential benefit from any successive notification required by a multiple-notification rule, *see* NPRM at ¶ 20 ("Would a single notification at the 80 percent usage mark be sufficient to provide consumers with reasonable notice that they are approaching a limitation for voice, text, or data usage or should additional notifications be sent to the consumer at the 90 or 95 percent mark of their monthly allotments?"), would be even more questionable.

[153] *See, e.g.*, Troy A. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, 81 Wash. U. L.Q. 417, 419 (2003) ("Studies show that at some point, people become overloaded with information and make worse decisions than if less information were made available to them.").

[154] *Central Hudson*, 447 U.S. at 556.

[155] *Id.* at 570 ("The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression.").

tools) and/or the promotion of consumer education (perhaps by the Commission in partnership with the wireless industry).[156] This the Commission cannot do. None of the Commission's cited data indicates that the proposed usage-notification rules are necessary. In fact, the Commission's usage-monitoring tool disclosure requirement is a *less* burdensome alternative that would be at least as likely to assist consumers with avoiding unexpected overages; this obvious, less burdensome alternative underscores the fact that the alerting mandate is "more extensive than necessary."[157] For this reason alone, the proposed rule would not appear to satisfy *Central Hudson*.

IV. THE NPRM'S ADDITIONAL MORE STRINGENT PROPOSALS ARE PARTICULARLY PROBLEMATIC.

The NPRM seeks comment on whether to impose even more detailed and rigid requirements. These requirements would be even less justified and would impose even more burdens on wireless providers. The Commission should reject these proposals and provide carriers with maximum flexibility to implement usage alerts.

Usage Caps. Carriers should not be required to cut off service to customers who have not specifically opted in to continued service after they have reached their monthly allowance of minutes, messages, or data.[158] Such a draconian requirement could result in severe consequences for the affected consumers. Indeed, under such a requirement, a child could be stranded at soccer practice with no means of contacting his parents because he could not make a call or send a text message and he is not authorized to make changes to his parents' cell phone plan.

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156 *See supra* Sections I.-II.

157 *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996).

158 *See* NPRM at ¶ 21 (seeking comment on whether cut off mechanisms would be useful to consumers or create additional challenges).

Similarly, a wife may not be able to contact her husband (or her doctor) when she goes into labor without first calling her wireless carrier to authorize additional minutes. Furthermore, many customers would be inconvenienced and likely irritated by a usage cap as they would be required to contact their carrier prior to calling into an important conference call or texting their friend that they are running late for dinner. While ideally consumers would contact their carrier as soon as they receive an alert letting them know they have reached their monthly allowance, this is not realistic. In Verizon Wireless' experience, customers often ignore such communications even after they have been contacted by text messages, emails, and voice messages. Accordingly, the Commission should not require carriers to terminate consumers' services when they reach their monthly allowance.

Moreover, such a mandate is clearly unnecessary given that customers already have ample options to cap usage. For example, they may subscribe to a pre-paid plan or one of the usage controls services currently provided by several carriers.[159]

Domestic Usage Alerts. If the Commission determines that carriers should be required to provide customers with domestic usage alerts, carriers should be allowed to determine the form, substance, and timing of the alerts, including whether to include specific cost information. Indeed, the Commission's proposed rules generally take this approach by indicating that alerts

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[159] *See, e.g.*, *supra* Sections I.A.1., I.B.; Verizon Wireless Usage Controls, https://wbillpay.verizonwireless.com/vzw/nos/uc/uc_home.jsp (describing how Usage Allowances allow customers to set limits for voice minutes and messages that may be used during a billing cycle); AT&T Smart Limits for Wireless, http://www.att.net/s/editorial.dll?bfromind=19048&eeid=7626667&_sitecat=3563&dcatid=0&eetype=article&render=y&ac=0&ck=&ch=smartcontrol&cat=smct (describing how Smart Limits allow customers to set limits for text and instant messages, downloadable content, and web browsing/data usage);

shall be provided while simultaneously allowing individual carriers to determine how to provide such alerts.[160]

The cost of providing usage alerts at certain intervals is substantial and this cost increases as the regulations governing such alerts get more specific. Indeed, depending on the requirement, carriers may be required to replace entire billing systems or restructure their system architecture just to provide customers with the alerts that the Commission thinks they want, diverting substantial dollars away from infrastructure buildout or other beneficial uses. Ultimately, customers will bear the costs of these new or upgraded systems.

In particular, the Commission should not require alerts to be provided in "real time."[161] Real-time alerting poses significant technical difficulties and will impose substantial additional costs. In addition, real-time alerts could significantly impact a carrier's network, degrading call quality and the customer experience. Such a requirement could also inhibit or delay the introduction of new services. Instead, carriers should have the flexibility to send alerts at appropriate intervals.

Finally, carriers should have the flexibility to determine how many and when usage alerts are sent as well as the text of such messages. Indeed, if the Commission micromanages these alerts, there could be many unintended consequences. For example, if the Commission mandates that carriers send alerts when consumers reach four different thresholds of their minute, message, and data allowances, consumers could be receiving as many as twelve alerts each month.[162] This

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160 *See* NPRM at App. A.

161 NPRM at ¶ 20.

162 *Id.* (seeking comment on whether a single notification is sufficient or if additional notifications should be required).

large number of alerts could lead customers to ignore all such messages.[163] Therefore, at most, carriers should be required to provide a single "approaching" notification and a "reached" notification for each service category. Similarly, carriers are limited by the number of characters that may be included in each text message alert. Thus, if carriers are required to provide certain information such as pricing information in these alerts, they could be required to either send an additional alert or exclude other information that customers may find more useful. The inclusion of pricing information in a text alert also could increase the cost of these alerts to carriers (and ultimately consumers) as not all customers will incur the same overage rate so the alerting system will need to not only have access to customers' usage, but also customers' service plan information—a complex task. In addition, if the Commission determines that usage notifications must be sent to all customers at a specified usage level, carriers should have the flexibility to determine that precise usage level.[164] Carriers also should be allowed to let customers opt out of receiving these messages.[165]

Roaming Alerts. Carriers also should be afforded flexibility in how they provide roaming alerts to customers.[166] For example, alerts should be required only when a customer's handset first registers in a foreign country. Such an alert would provide customers with the most critical information they need to know—they have connected to a cell site in a foreign country and will incur additional charges if they use their device. To require more regular alerts could result in customer confusion and annoyance. In addition, as with domestic alerts, carriers should be

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163 *See* Paredes, *supra* note 153, at 441-43.

164 NPRM at ¶ 20.

165 *Id.* at ¶ 21.

166 *Id.* at ¶ 22.

allowed to determine the substance of these alerts. Carriers are extremely limited in the amount of information they may transmit to customers in a text message. Customers may find that non-price information, such as the phone number for international roaming support and how to call the U.S., is more important to them. And, as with domestic alerts, the inclusion of country-specific cost information poses significant technical problems as carriers would need to integrate this information into their alerting system. The costs of such integration, however, are substantial while the benefits are minimal, as customers generally have ready access to it on carriers' websites.[167]

In addition, any required alerts should be limited to international roaming as many carriers offer nationwide plans under which all domestic roaming is covered.[168] Verizon Wireless, in particular, only offers nationwide plans and while a handful of customers remain on grandfathered regional plans, this is a very small number and these customers have been offered the opportunity to upgrade to a national plan. If the FCC does require domestic roaming alerts, it should also adopt a *de minimis* exception for carriers that do not currently offer non-nationwide plans and who have less than 10 percent of customers on a non-nationwide plan.

Implementation Deadlines. If rules are ultimately adopted, carriers will need time to develop and implement new or updated systems and architecture that will be able to comply with

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[167] In its current international Welcome Message, Verizon Wireless includes a link to the website where customers may obtain country-specific cost information as well as the international customer service number.

[168] NPRM at ¶ 22 (noting that several commenters have indicated that domestic roaming in the United States poses fewer difficulties to consumers because there is little or no domestic roaming for many subscribers and seeking comment on whether this fact should factor into its analysis).

the requirements.[169] For example, carriers may need to replace their current billing systems or develop new software that is capable of regularly monitoring customers' usage levels and sending alerts based on that usage. Therefore, carriers should have an absolute minimum of 18 months to implement any adopted requirements. More time, however, may be needed if the Commission adopts more extensive requirements than are included in the current draft rule.

V. CONCLUSION

In sum, the appropriate model for meeting wireless consumers' needs in today's competitive marketplace is to rely upon providers' strong incentives to satisfy consumers, rather than prescriptive regulations that would limit the flexibility of providers to respond to consumers' evolving needs. The Commission, however, can and should help educate consumers about the variety of usage management tools available today. Verizon Wireless looks forward to partnering with the Commission in that effort.

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[169] *Id.* at ¶ 23 (acknowledging that mobile providers may need to revise their existing systems to comply with a mandatory usage alert requirement).